No. 14864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 14864

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a Judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of two counts of an Indictment charging him with conspiracy to commit offenses against the United States, in violation of Section 371 of Title 18, United States Code [T. 1-3], and with counselling, inducing, and procuring another to counterfeit obligations and securities of the United States, in violation of Section 471 of Title 18, United States Code [T. 3-4].

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California [T. 2-3].

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the Judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

Appellee adopts the statement of the case as set forth in appellant's opening brief with the following additions: The overt acts numbered 2, 3 and 4 of Count One of the Indictment were proved. Appellant, after denial of his motion for acquittal at the close of the Government's case [T. 17], proceeded to introduce evidence on his own behalf [T. 18-19], and thereafter failed to renew his motion for acquittal under Rule 29(a) at the close of all the evidence, although he made other motions at that time [T. 23].

III.
STATEMENT OF FACTS.

Early in May, 1954, Madray, co-defendant Opitz and appellant held a conversatoin at the Trade Winds located at 334 South Market Street, Inglewood, California [R. 97-98, 100-102]. This was a night club owned by appellant [R. 313]. They discussed obtaining counterfeit money, and possible ways to dispose of it profitably. Later in May, Opitz brought co-defendant Shire, a printer, into the picture, introducing him to Madray [R.

110-111]. Appellant had already employed Shire on previous occasions for printing work [R. 324]. There was a discussion between appellant and Madray about paper which could be used for the proposed counterfeit money, which conversation took place at the Trade Winds [R. 103-108]. Other meetings of the parties to the conspiracy also took place at the same location [R. 109, 113-114].

Later on, in late June or July, 1954, in the alley behind the Trade Winds, defendant Hallak exhibited a counterfeit $50 bill to Madray, and told him that he could obtain them in $10,000 lots for a price of 20¢ on the dollar [R. 114-115]. Hallak and appellant were acquainted, according to appellant's admission on the stand [R. 314]. They lived together at Hallak's residence, according to appellant, for only three weeks during August, 1954 [R. 69, 325], but at the time of Hallak's arrest for possession of some of the counterfeit [Govt. Exs. 2 and 3] property claimed by appellant [Govt. Exs. 6 and 7] was still in Hallak's house. This included appellant's blankets, which were still on one of the beds [R. 165-166]. In addition to the property listed in Exhibits 6 and 7, some of the sheets belonging to plaintiff were still at the house [R. 169].

After Hallak's ill-fated attempt to dispose of the counterfeit and his subsequent arrest there is no evidence of renewed activity by the counterfeit ring prior to January, 1955, when Madray called Opitz about another matter [R. 119]. Opitz then mentioned he could

still obtain counterfeit money. Negotiations between Madray and co-defendants Opitz and Shire ensued. On February 2, 1955, in Pershing Square, Los Angeles, Shire told Madray that Opitz and Shire "had to talk to the person who had control of this, the say-so, as to the price of this counterfeit money" [R. 122]. Finally a meeting was held on February 7, 1955, at Pat Mar's Drive In, Imperial Highway and Sepulveda Boulevard, El Segundo, California, between the informer Hall, undercover agent Carli, Opitz, Shire and Madray [R. 127-129]. A motel room at the Del Mar Motel, located about a block and a half from Pat Mar's, was obtained to effect the transfer of the counterfeit [R. 33]. Co-defendants Opitz and Shire left the room to obtain the counterfeit bills [R. 34]. They first went to Pat Mar's where co-defendant Shire telephoned. Opitz heard him say, "Hello, hello, hello Jack," but said he did not hear the balance of the conversation [R. 492-493]. According to co-defendant Opitz, Shire later denied that he was calling Jack Winger [R. 496], but the court was entitled to disbelieve this evidence. Shire and Optiz were gone for approximately 45 minutes, and thereafter returned with the counterfeit [Ex. 4], and they both went back to the Del Mar Motel room [R. 34]. They took the counterfeit into the room and were later arrested while still there [R. 35]. The counterfeit was identical to that which Hallak had had at the time of his arrest in September, 1954 [R. 40].

IV.
ARGUMENT.

A. Appellant Failed to Renew Motion for Acquittal at Close of All Evidence, Thereby Waiving His Right to Object to District Court's Adverse Ruling at Close of Government's Case [T. 23, R. 261-267].

Appellant's specification of error No. 1 is not reviewable on appeal. He waived any right to object to the court's denial of the motion for acquittal at the close of the government's case by putting in evidence on his own behalf, and failing to renew his motion at the close of all the evidence.

Mosca v. United States, 174 F. 2d 448, 450-451 (9th Cir., 1949);

Malatkofski v. United States, 179 F. 2d 905, 910 (1st Cir., 1950).

(As to the necessity of making a motion for acquittal at the close of all evidence.)

United States v. Powell, 155 F. 2d 184 (7th Cir., 1946);

Leeby v. United States, 192 F. 2d 331, 333 (8th Cir., 1951).

Appellant was represented by experienced counsel who presented the motion for acquittal as well as other motions at the close of the government's case [T. 17], and at the close of all the evidence made motions to strike, but did not renew his motion for acquittal [T. 23].

B. Upon Failure of Appellant to Move for Acquittal at Close of All Evidence, the Insufficiency of Evidence Will Be Considered on Appeal Only as a Matter of Grace or Sound Discretion.

Appellant's specification of error No. 2 is ordinarily not reviewable on appeal by virtue of the fact that he failed to make a proper motion for acquittal at the close of all the evidence. The appellate court will consider the evidence in such a case only as a matter of grace or in its sound discretion.

Malatkofski v. United States, 179 F. 2d 905, 910 (1st Cir., 1950);

Leeby v. United States, 192 F. 2d 331, 333 (8th Cir., 1951).

C. Questions of Fact and of Credibility Are for the Trial Court.

It is well settled that the appellate court will not review questions of fact or weigh evidence, where there is any substantial and competent evidence to support a finding of guilt, that the court will take a view of the evidence most favorable to the government and will give the government the benefit of all inferences which reasonably may be drawn from the evidence.

Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948), cert. den. 335 U. S. 853.

(The foregoing rules apply to court trials also.)

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir., 1952), cert. den. 344 U. S. 892;

United States v. Empire Packing Company, 174 F. 2d 16 (7th Cir., 1949), cert. den. 337 U. S. 959.

D. There Was Some Substantial Evidence to Support the Judgment of Conviction.

The finding of guilt by the court was amply supported by the evidence.

Count One: Appellant participated in the initial planning for the obtaining and use of the counterfeit [R. 97-98, 100-102, 103-108]. Much of the activity in connection with the counterfeit ring took place around his Trade Winds night club [R. 109, 113-115]. Hallak made his first attempt to dispose of some of the counterfeit bills at the Trade Winds [R. 114-115]. Hallak made the second attempt to dispose of counterfeit bills at the house in which he and the appellant then lived [R. 69-70, 165-166]. During the third attempt Shire did not have the counterfeit with him except for samples. After an agreement as to terms was reached, Shire telephoned "Jack" before he went to procure the $150,000 of counterfeit bills [R. 127-129, 492-493]. The District Court could reasonably infer that the call was to the appellant, Jack Winger. It follows that there was some substantial and competent evidence to support the judgment of conviction as to Count One.

To prove a conspiracy it is sufficient to show an agreement, and that any of the conspirators performed one of the overt acts.

Section 371, Title 18, United States Code;

Braverman v. United States, 317 U. S. 49, 53;

Marino v. United States, 91 F. 2d 691, 693-695 (9th Cir., 1937).

In considering whether or not there was an agreement, we are not tied down to the "plain words of the statements attributed to" appellant, as appellant urges on page 18 of his opening brief. The trier of facts is entitled to draw reasonable inferences from the testimony, the established facts, the exhibits, and the demeanor of witnesses, of what is said and what is omitted in testifying. It is common knowledge that conversations of persons planning criminal activities are for many reasons not models of technical precision. They are not lawyers drafting legal documents. The very nature of the persons involved and of their activities precludes such precision. For this very reason it is most important that the decision of the learned trial court, which had the opportunity to observe the witnesses' demeanor at the time they were testifying, should not be overturned too readily. This is especially true in a case, as here, where an experienced trial judge has weighed the evidence.

Count Two: There is the original conversation which took place between Madray, Opitz and appellant, in which appellant suggested obtaining and disposing of the counterfeit bills [R. 97-98, 100-102]. Shortly after that time Opitz brought Shire, the printer, into the picture [R. 110-111]. Shire had already been used by appellant for printing work [R. 324]. The question of obtaining neces-

sary paper for the counterfeit bills was discussed between Madray and appellant, and also by Madray, Opitz and Shire [R. 103-109]. The trial court has found that Shire printed the counterfeit bills [R. 540]. Finally, Shire telephoned "Jack" during the final arrangements to sell $150,000 of the counterfeit and before he procured it, on the night of February 7, 1955 [R. 492-493]. It is to be noted that the Del Mar Motel, El Segundo, is only approximately seven miles from the Trade Winds night club, Inglewood. Shire and Opitz were gone from the motel room for forty-five minutes to get the $150,000 in counterfeit [R. 34]. It follows that there was some substantial and competent evidence to support the finding of guilt on Count Two.

The appellant's attitude as to the evidence on Count Two obviously overlooks the fact that the Government does not have to show that appellant directly counselled, induced and procured Shire to make the counterfeit.

> "It is not necessary that there should be any direct communication between an accessory before the fact and the principal felon; it is enough if the accessory direct an intermediate agent to procure another to commit the felony, without naming or knowing of the person to be procured."
>
> *Morei v. United States,* 127 F. 2d 827, 830 (6th Cir., 1942);
>
> Section 2, Title 18, United States Code.

The trial court might readily infer from the facts given that Opitz brought Shire into the picture at the behest of appellant. Shire was found guilty of manufacturing the counterfeit, and he has not appealed.

V.
CONCLUSIONS.

I. The appellant waived any right to raise the two points specified on appeal by his failure to renew his motion for acquittal at the close of all the evidence.

II. The evidence was sufficient to show that a conspiracy in fact existed. The fruits of the conspiracy were in evidence in the form of approximately $154,000 of counterfeit notes. Appellant was the initial moving force in getting the counterfeit printed, as evidenced by his conversation in early May, 1954 with Madray and defendant Opitz. Appellant later discussed with Madray the subject of obtaining paper upon which to print the conuterfeit. Appellant continued in the conspiracy up to and including its unexpected and unsuccessful termination at the time of the attempted sale of the counterfeit notes to Secret Service agents.

III. The evidence was sufficient to show that appellant counseled, induced and procured defendant Shire, through the agency of defendant Opitz, to make the counterfeit notes.

The Government respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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